

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JOHN RANDALL FUTCH,)
)
 Movant,) Case No. CV414-076
) CR402-285
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

REPORT AND RECOMMENDATION

John Randall Futch has filed his third 28 U.S.C. § 2255 motion attacking his 2002 drug conviction. (Doc. 1); *Futch v. United States*, No. CV405-053 (Aug. 11, 2005) (granted in part and denied in part); *Futch v. United States*, No. CV409-146 (Dec. 16, 2011) (denied on the merits). He insists that his conviction must be set aside because of a structural error in violation of the rule set forth in *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014). (Doc. 2.)

As this is a successive motion, Futch must first “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A); *see* 28 U.S.C. §

2255(h) (cross-referencing § 2244 certification requirement). This Court *must* dismiss second or successive petitions, without awaiting any response from the government, absent prior approval by the court of appeals. *Tompkins v. Sec'y, Dep't of Corrs.*, 557 F.3d 1257, 1259 (11th Cir. 2009); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996); *see also Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997).

Futch has filed his latest § 2255 motion without prior Eleventh Circuit approval, and thus this Court is without jurisdiction to consider it. Because the motion must be **DISMISSED** as successive, no Certificate of Appealability COA should issue. 28 U.S.C. § 2253(c)(1); *see Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (approving *sua sponte* denial of COA before movant filed a notice of appeal). And, as there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith. Thus, *in forma pauperis* status on appeal should likewise be **DENIED**. 28 U.S.C. § 1915(a)(3).

SO REPORTED AND RECOMMENDED this 9th day of June, 2014.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA